

ATTACHMENT A
THE PROPOSED DECISION

BEFORE THE
BOARD OF ADMINISTRATION
CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM
STATE OF CALIFORNIA

In the Matter of the Application for the
Industrial Disability Retirement of:

CHRISTA M. ARRONA,

Applicant/Respondent,

and

CALIFORNIA INSTITUTION FOR WOMEN,
CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION,

Contracting Entity/Respondent.

Case No. 2015-0538

OAH No. 2015090470

PROPOSED DECISION

Kimberly J. Belvedere, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on June 14, 2016, in San Bernardino, California.

Preet Kaur, Staff Counsel, represented Anthony Suine, Chief, Benefit Services Division, California Public Employees' Retirement System (CalPERS), State of California.

Christa Arrona, respondent, represented herself.

The matter was submitted on June 14, 2016.

ISSUE

Does competent medical evidence establish that Ms. Arrona was substantially disabled or incapacitated from performing the usual and customary duties of a licensed vocational nurse at the California Institution for Women as a result of orthopedic injuries (neck, fingers, back, and pinched nerve) at the time she filed her application for a disability retirement on September 25, 2014?

PUBLIC EMPLOYEES RETIREMENT SYSTEM

FILED June 24 20 16

Marlene Martinez

SUMMARY

The competent medical evidence established that Ms. Arrona was not at the time she filed her application for disability retirement, and is not currently, substantially incapacitated from performing the usual and customary duties of a licensed vocational nurse. Although Ms. Arrona was credible with respect to her claim of pain while performing her duties, the prevailing case law does not consider an unsupported claim as meeting the substantial incapacitation standard for purposes of a disability retirement.

FACTUAL FINDINGS

Jurisdictional Matters

1. Ms. Arrona was first employed as a licensed vocational nurse by the California Institution for Women (CIM), Department of Corrections, in 2011.¹ By virtue of her employment, respondent is a member of CalPERS subject to Government Code section 21151.

2. On September 25, 2014, Ms. Arrona signed a Disability Retirement Election Application (application) and filed it with CalPERS. Ms. Arrona claimed to have been injured at work on January 20, 2013, as a result of pulling on “heavy correctional doors” and “pushing heavy medical carts” to tend to the medical needs of inmates. In the application, respondent claimed her right to receive a disability retirement was based on an orthopedic injury, specifically, a bulging disc, numb fingers, and pinched nerve. She identified her limitations as “pain in upper back and headache due to pinched nerve.”

3. CalPERS obtained and reviewed medical records and reports related to Ms. Arrona’s condition. CalPERS selected an independent physician to perform a disability evaluation of Ms. Arrona. James Fait, M.D., examined Ms. Arrona on February 27, 2015. Dr. Fait concluded Ms. Arrona was not substantially incapacitated from performing the usual and customary duties of a licensed vocational nurse. Dr. Fait authored a report memorializing his findings.

4. After review of all relevant medical reports, including the independent medical examination completed by Dr. Fait, CalPERS determined that respondent was not permanently disabled or substantially incapacitated from performance of her usual job duties at the time she filed her application for a disability retirement.

5. By letter dated March 27, 2015, CalPERS notified Ms. Arrona of its determination that she was not entitled to a disability retirement. On April 7, 2015, Ms. Arrona appealed that determination.

¹ Although she has not worked at CIM since 2014, she remains employed by CIM pending the outcome of this appeal.

6. On July 23, 2015, Anthony Suine, Chief, CalPERS Benefits Services Division, signed the Statement of Issues in his official capacity denying Ms. Arrona's application for a disability retirement. This hearing ensued.

Duties of a Licensed Vocational Nurse²

7. The Department of Corrections' list of usual and customary job duties and essential functions of a licensed vocational nurse require, generally, while performing medical evaluations and working in the correctional environment, that a vocational nurse be able to: Remain alert, focused, and able to evaluate and respond to emergencies; walk occasionally to continuously long distances indoors or outdoors in various weather conditions; climb and descend stairs; sit occasionally to continuously; stoop and bend occasionally to frequently; lift and carry from 20 to 100 pounds occasionally to frequently; pushing and pulling occasionally to frequently; twist the body in all directions; reach occasionally to continuously; assist patients with dressing, bathing, and personal hygiene; and maintain sufficient strength, agility and endurance to perform during stressful (physical, mental and emotional) situations without compromising the health and well-being of others.

Respondent's Claimed Disability

8. On April 29, 2012, respondent was collecting and hanging up personal protective equipment received from other correctional officers on brackets mounted to a wall. Respondent lost her balance and grabbed one of the wall brackets but could not regain her balance and she fell to the ground. Respondent claimed on her disability application that she continued to experience "ongoing problems" such as "throbbing and pain" and "spasms" on the "left side of [her] back." Respondent claimed that she is limited to lifting no more than 25 pounds and unable to wear her protective vest. As a result, she claimed she could not perform the usual and customary duties of a licensed vocational nurse.

Medical Evidence Presented by CalPERS

9. Dr. Fait testified at the hearing regarding his independent medical evaluation of Ms. Arrona on February 27, 2015, and subsequent report he wrote regarding Ms. Arrona's medical evaluation. Dr. Fait is a board certified orthopedic surgeon. He obtained his medical degree in 1996 from the University of California, Davis. Following medical school, he completed his internship in surgery and his residency in orthopedic surgery. Dr. Fait also completed post-doctoral training in hip and knee reconstruction.

10. After completing his residency, Dr. Fait worked at Kasier Permanente for approximately 11 years in the Department of Orthopedic Surgery. When he left Kasier, he worked in private practice for three years performing orthopedic surgery. Dr. Fait

² The above-referenced duties are a general summary of the physical requirements listed as essential functions of a licensed vocational nurse. There is no dispute as to Ms. Arrona's ability to competently perform the medical functions of her position.

specializes in disorders of the joints or bones, predominantly joints and/or bones located in the back, mid-back, neck and extremities. He completes both operative and non-operative assessments of patients suffering from conditions of the joints and bones, treats fractures, performs reconstructive surgery, and treats patients for degenerative conditions.

11. Dr. Fait is familiar with the standard used by CalPERS to determine whether someone is substantially incapacitated from performing their usual and customary duties for purposes of an industrial disability retirement. CalPERS attached a letter describing the standard with the letter sent to Dr. Fait when it requested he perform an independent medical evaluation of Ms. Arrona.

12. Prior to physically examining Ms. Arrona, Dr. Fait reviewed the essential functions of a licensed vocational nurse for CIM as well as Ms. Arrona's prior medical records.³ Dr. Fait interviewed Ms. Arrona in order to ascertain the mechanism of injury; history of injuries; why Ms. Arrona applied for an industrial disability retirement; what past treatments were rendered; and her occupational, social and family history

13. In the summary of Dr. Fait's report, he described Ms. Arrona's medical history as follows:

The examinee reports that, during the course of her usual and customary duties in a new locked facility she was required to open and close very heavy metal doors and operate a lock on a repeated basis. In January of 2013, she noticed symptoms of pain on the outer side of her left elbow.

She was referred for treatment and was seen by Dr. Jackson Alparce with a diagnosis of lateral epicondylitis. She was placed on modified duty and underwent a course of conservative treatment, including physical therapy, use of an elbow brace, and prescriptions of anti-inflammatories and Tramadol. The symptoms were ongoing and therefore she was referred to Dr. Carl Smith on March 28, 2013 for an initial orthopedic evaluation. She declined an injection at that time and Dr. Smith continued recommendations for anti-inflammatories, modified duties at work, and use of an elbow strap type brace. She subsequently underwent a course of physical therapy with documentation of slow improvement of symptoms and came under the care of Dr. Scott Goldman. On August 26, 2013, Dr. Goldman felt that the lateral epicondylitis of the left elbow had improved and he declared that she had reached a permanent and

³ Dr. Fait reviewed medical reports concerning respondent's injury completed by Dr. Jackson Alparce, Dr. Scott Goldman, and Dr. Carl Smith. He also reviewed, prior to the hearing, a more recent medical evaluation of Ms. Arrona completed by Dr. Robert Kolesnik.

stationary status with no impairment to perform activities of daily living, 0% impairment of the elbow, capable of performing regular work duties.

On October 2, 2013, the examinee reported to Dr. Goldman with complaints of left elbow pain, pain in the knee, and neck pain radiating to the left upper extremity, which apparently she indicated was secondary to doing pushing and pulling on heavy doors. He renders a diagnosis of disk bulging at C5-6 and C6-7 with full work duties. Ongoing complaints of neck pain were noted and on February 12, 2014, Dr. Goldman recommended an MRI of the cervical spine. He also documents headaches. On March 14, 2014, Dr. Goldman indicated that the examinee was unable to continue work because of the painful neck condition and radiating pain to the left upper extremity and she was placed on temporary total disability. Her last day worked was March 14, 2014. The examinee was subsequently sent for a course of physical therapy, which continued through May 19, 2014, with continued complaints of tension headaches and tingling in the upper extremities.

An MRI of the cervical spine was performed on May 22, 2014 demonstrating a 3-mm, broad-based, left paracentral and posterolateral disk protrusion at C5-C6. No canal stenosis was identified and no neural foraminal narrowing was noted. Minimal facet disease was noted.

A note of June 11, 2014 indicates a notice of non-compliance with physical therapy.

The examinee continued treatment with Dr. Scott Goldman with ongoing complaints of neck pain, headaches, and left upper extremity radiculitis. She continued on temporary total disability status and continued on oral pain medications. The final medical treatment note is that of November 21, 2014, a progress note by Dr. Scott Goldman, in which the examinee complains of painful neck condition, spasms, daily headaches, and radiating pain and numbness down the left upper extremity to the fourth and fifth digits with no improvement. He recommended continued temporary total disability status and has prescribed medications.

14. On the date of her examination with Dr. Fait, Ms. Arrona reported that she was experiencing "throbbing, pinching, aching, and burning pain in the back." She told Dr. Fait that the pain was present "all the time," worsens with "activity," and radiates from her back

to her left shoulder and to her left rib area when performing activities like twisting, running, lifting, lying on her left side, and when reaching overhead.

15. Ms. Arrona told Dr. Fait that she has neck pain all the time. She told Dr. Fait the neck pain radiated down to her left shoulder. Ms. Arrona also complained of a popping or locking sensation in her neck, headaches, nausea, and numbness/tingling in her left fingers. Ms. Arrona claimed to have difficulties not only with her job, but also with the activities of daily living such as cooking, cleaning, reaching overhead, dressing, folding, driving, and reaching.

16. During his physical examination, Dr. Fait took respondent's vital signs and circumferential measurements of her upper and lower extremities. He did not note anything unusual regarding the vital signs or measurements, except a one-inch difference between the circumference of her right and left forearms, wrists, and hands, which he described as normal given that Ms. Arrona is right-side dominant.

Dr. Fait measured respondent's grip strength using the Jamar Dynamometer. This test involved having respondent grip the measuring device with both hands in order to produce a reading in kilograms of pressure for each hand. Dr. Fait found that Ms. Arrona's grip strength was normal for a healthy adult.

Dr. Fait examined different areas of respondent's spine. He did not find any deformities, scars, scoliotic deformity, or loss of lordosis. He did note a slightly restricted range of motion, tenderness on her right side, and paraspinal spasm. Dr. Fait further examined Ms. Arrona's cervical spine area and found no evidence of nerve entrapment (Spurling's sign) on either the left or right side. Despite the paraspinal spasm and tenderness, Dr. Fait found no evidence of abnormal neurological function in the upper or lower extremities.

Dr. Fait examined respondent's shoulders. He measured her forward flexion, abduction, internal and external rotation but did not observe any abnormal limitations on her range of motion. As he examined her wrists and elbows, he did not note any evidence of numbness or tingling that would correlate to a pinched nerve.

Dr. Fait diagnosed Ms. Arrona with cervical spine degenerative disk disease and 3-mm left paracentral disk protrusion, C-5 and C-6, with intermittent symptoms of left upper extremity radiculitis. Dr. Fait reviewed the usual and customary job duties of a licensed vocational nurse. He concluded although Ms. Arrona may have pain or discomfort, there was no specific job duty she could not perform because of her condition. He further concluded she was not substantially disabled from performing the usual or customary duties of her position as a licensed vocational nurse.

17. Ms. Arrona's most recent medical examination occurred on January 28, 2016, in connection with her worker's compensation case. Robert Kolesnik, M.D., performed that examination in his capacity as a qualified medical examiner. Dr. Kolesnik did not testify, but

Dr. Fait reviewed his supplemental orthopedic panel qualified medical evaluation report dated April 15, 2016. That report indicated Dr. Kolesnik reviewed over 32 prior medical reports relating to Ms. Arrona's claimed injury and treatment, including an October 7, 2015, report by Dr. Scott Goldman releasing Ms. Arrona to full duty. Dr. Kolesnik diagnosed Ms. Arrona with cervical strain; left shoulder sprain/strain; sprain/strain left elbow; traumatic left elbow lateral epicondylitis (tennis elbow); and thoracic strain. He recommended continued physical therapy at home, and stretching/strengthening exercises for her neck, back, and left upper extremities.

Like Dr. Goldman and Dr. Fait, Dr. Kolesnik concluded that Ms. Arrona could return to full duty with no restrictions.

The Video Evidence

18. CalPERS provided a DVD containing multiple videos of surveillance conducted on Ms. Arrona on December 22, 2014, January 6, 2015, January 7, 2015, January 8, 2015, and January 15, 2015. Many more days of surveillance were conducted, but only the most relevant were provided on the DVD.

19. CalPERS Investigator Moriah Jackson testified at the hearing regarding her surveillance of Ms. Arrona on the above-referenced dates. The video was reviewed by the administrative law judge. As Ms. Jackson correctly stated in her report regarding the surveillance, the videos showed Ms. Arrona generally engaged in daily activities around her home. She was able to get in and out of vehicles; drive the vehicle; carry bags to and from the vehicle; lift various items; open and close the car door; bend down to replace the front and back license plates to her vehicle; shop at various stores and carry selected items, such as a mop; and carry a backpack on her back and a purse on her shoulder.

20. It did not appear in the video that Ms. Arrona had any difficulties performing any of the above daily activities.

Evidence Presented by Ms. Arrona

21. Ms. Arrona testified that she has been a licensed vocational nurse for 10 years. She was very excited when she was hired by the State of California. She asserted, however, that the correctional institutions across the state are "not ergonomically thought out." As a result, she began to experience pain in her elbows, shoulder, neck and back in 2013.

22. Ms. Arrona testified that she has seen multiple doctors and testified she is very frustrated because she did not have pain or problems prior to working for the state. She said her pain causes nausea and vomiting. She needs pain medication but refuses to take opioids because she does not want to be chemically dependent on them.

23. Ms. Arrona currently works at Kaiser and has been working there since August 2015. Her duties include screening from 5 to 20 patients per day prior to them being

seen by a doctor. Ms. Arrona claimed that she does not have to see as many patients as she did with CIM, and that she works in an ergonomically sound environment.

24. Despite her claim that the new work environment is ergonomically sound, Ms. Arrona still maintains she suffers pain, headaches, and nausea. She testified that she has used all her sick time. In her written opening statement, which she also used as testimonial evidence, Ms. Arrona wrote:

I believe I should be able to retire so I don't have to work when I am not feeling well. My injury is not my fault it is the state[']s and . . . I believe the state should provide continued care and honor my request for retirement.

25. Ms. Arrona stated at the hearing that she does not feel she “should have to suffer because of some BS law that you can work with pain . . . I believe I should not have to [work].”

26. Ms. Arrona did not provide any competent medical evidence to indicate that she was substantially incapacitated from performing the usual and customary duties of her job as a licensed vocational nurse at CIM.

Evaluation of the Evidence

27. No competent medical evidence supported Ms. Arrona's claim that she was substantially incapacitated from performance of her usual and customary job duties at the time she filed her application for an industrial disability on September 25, 2014. To the contrary, the evidence established that she was released for full duty by three separate doctors on three separate occasions.

Dr. Fait's expert testimony qualifies as a competent medical opinion. Dr. Fait is a trained orthopedic surgeon with substantial experience in diagnosing and treating conditions like the one claimed by respondent on her disability application. Dr. Fait reviewed numerous medical records and reports. He conducted a detailed interview of respondent and completed a comprehensive independent physical examination of her. Based on the medical evidence in the record, Dr. Fait determined that Ms. Arrona, despite having intermittent pain, was not substantially incapacitated from performing the usual and usual and customary duties of a licensed vocational nurse.

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LEGAL CONCLUSIONS

Burden and Standard of Proof

1. Absent a statutory presumption, an applicant for a disability retirement has the burden of proving by a preponderance of the evidence that he or she is entitled to it. (*Glover v. Bd. of Retirement* (1989) 214 Cal.App.3d 1327, 1332.)

Applicable Statutes

2. Government Code section 20026 provides in part:

“Disability” and “incapacity for performance of duty” as a basis of retirement, mean disability of permanent or extended and uncertain duration, as determined by the board . . . on the basis of competent medical opinion.

3. Government Code section 21151, subdivision (a), provides in part:

Any patrol, state safety, state industrial, state peace officer/firefighter, or local safety member incapacitated for the performance of duty as the result of an industrial disability shall be retired for disability, pursuant to this chapter, regardless of age or amount of service.

4. Government Code section 21156, subdivision (a), provides in part:

(a)(1) If the medical examination and other available information show to the satisfaction of the board . . . that the member in the state service is incapacitated physically or mentally for the performance of his or her duties and is eligible to retire for disability, the board shall immediately retire him or her for disability . . .

(2) In determining whether a member is eligible to retire for disability, the board . . . shall make a determination on the basis of competent medical opinion and shall not use disability retirement as a substitute for the disciplinary process. . . .

Appellate Authority

5. “Incapacitated” means the applicant for a disability retirement has a substantial inability to perform his or her usual duties. When an applicant can perform his or her customary duties, *even though doing so may be difficult or painful*, the employee is not

incapacitated and does not qualify for a disability retirement. (*Mansperger v. Public Employees' Retirement System* (1970) 6 Cal.App.3d 873, 886-887 [emphasis added].) Mere difficulty in performing certain tasks is not enough to support a finding of disability. (*Hosford v. Bd. of Administration* (1978) 77 Cal.App.3d 854.) Further, respondent must establish the disability is presently disabling; a disability which is prospective and speculative does not satisfy the requirements of the Government Code. (*Id.* at 863.)

Cause Exists to Deny the Application

6. Cause does not exist to grant Ms. Arrona's application for an industrial disability retirement. A preponderance of the evidence did not establish that she suffered from a physical or mental condition of a permanent or extended and uncertain duration that rendered her substantially incapacitated from performing the usual and customary duties of a licensed vocational nurse at the time she filed her application for an industrial disability retirement.

ORDER

The application for an industrial disability retirement filed by Christa Arrona with the California Public Employees' Retirement System is denied.

DATED: June 23, 2016

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Kimberly Belvedere
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KIMBERLY J. BELVEDERE
Administrative Law Judge
Office of Administrative Hearings